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Trial Methods of the Inquisition

By JACK GARRETT SCOTT, of the Denver Bar

(A Paper Presented to the Law Club of Denver)

THE subject of the Inquisition has been one of bitter controversy for several centuries. In most cases, when a man has perpetrated a history of the inquisition, he has been either impassioned in denunciation of it, or unfair in defense of it. Consequently, it has been somewhat difficult to obtain the plain facts upon this particular subject in such a way that I could be assured they were not colored by the bitterness and prejudice of its historians.

I found out, after some preliminary investigation, that a complete and thorough understanding of the trial methods of the Inquisition, together with a justification for its processes and procedure, was almost impossible without considerably more knowledge of the history, origin and background of the institution than I possessed. The Inquisition, to me, always has been but a name without very much else, yet it was an institution which dominated the civilized world for about five centuries, and left an indelible imprint upon history.

The Inquisition arose about the end of the twelfth century, or the beginning of the thirteenth, as a result of several different factors. The first of these was the effort of the Christian church, which then was firmly established in practically all of the civilized world, to retain and increase its temporal power. The second was the fanaticism and zealousness of the officials of the church, to retain all of its members in the fold, and under its domination. The third was a general intellectual awakening, which resulted in widely scattered communities beginning to reason for themselves about their religion and to refuse to follow blindly the dictates of the church. Another is that in an increasing number of instances Episcopal officials were autocratic, arbitrary and corrupt.

There arose groups of people, such as the followers of Peter Waldo, the Albigenses and the Cathari, who revolted against some of the church's teachings and formed doctrines and religious beliefs of their own. The temporal authorities were persuaded or coerced by the church to proceed against these heretics in armed warfare. We see then a period of wars and seiges, resulting in success to the church forces and disaster to the heretics. At the close of these wars there was an earnest, but unorganized effort, to suppress heresy through the church organization, as it then stood. The Bishops of the various sees were ordered to proceed in the matter and were given broad powers to accomplish its suppression. The ecclesiastical courts, which followed the Roman law, and which theretofore had had jurisdiction over such matters as marriage, inheritance, usury and similar subjects, were given authority to proceed against heretics and to prosecute them criminally for their beliefs. This effort was ineffective and desultory. The spirit of revolt against organized Christianity continued to grow.

Finally the Inquisition arose, as an instrument and means for stamping out heresy. It commenced with the appointment of inquisitors for certain districts, to investigate the extent of heresy, the identity of the wrong-doer, and to prosecute and punish him. It was not an institution which was suddenly founded, projected and organized, but was one which was moulded, step by step, out of materials which lay nearest at hand at the time, and which seemed to be best fitted for the object to be obtained. The temporal inquisition and the secular inquisition having failed, their successor, the legative Inquisition, not only became a very definite and effective part of the church organization, but also a dominant, integral factor in the administration of law.

It is sometimes said that the Inquisition was founded April 20, 1233, the day on which Gregory issued two bulls, making the persecution of heresy the special function of the Dominican order. Regardless of the accuracy of that statement, we know that the permanent inquisition was turned over to the two Mendicant Orders, the Dominican and the Franciscan. Inquisitors were appointed from the membership of these orders, and from that time thenceforth the entire institution was apparently in their hands, free from very much participation by the ordinary Episcopal authorities. Although these two mendicant orders were originally formed for the purpose of persuading by argument and example, when the Inquisition became a settled institution, they dominated and suppressed by force.

In the hands of the mendicant orders it was natural for inquisitorial districts to be formed coterminous with the provinces of the orders themselves. For each district an inquisitor was appointed whose headquarters were maintained usually in the chief town of the province. Proceedings at first

were held in the cathedral, church, or some municipal building, but later special buildings were erected for the particular purpose, amply furnished with the necessary appliances and dungeons which formed such an important part of the institution.

I have said this much concerning the background of the Inquisition as an institution, as I was prompted by the fear that there might be some unfortunate member of this club whose knowledge of history was as deficient as mine. Now as to its organization.

In some instances we find two inquisitors working together in the same district, but ordinarily there was but one. Each inquisitor was entitled to one or more assistants, the number determined at the whim of the inquisitor or according to the prevalence of heresy in his province. These assistants were either members of one of the mendicant orders, ordinarily the prior of the local Dominican convent, or some member of the Episcopal organization. Their duties were matters of detail in assisting the inquisitor in his work.

In addition to these assistants, inquisitors had the authority to appoint commissioners, who were empowered to act in the absence or the incapacity of the inquisitor, or in some distant place to which the inquisitor did not desire to go. They were appointed by the inquisitor and were dischargeable by him at will, but they could wield full power in the matters of citation, arrest and examination, (the examinations consisted of physical torture among other things) and had complete inquisitorial authority short of final sentence in capital cases. It seems that the case of Joan of Arc was an exception to this rule, and that the commissioner there exercised the power of final condemnation.

Another official about whom we little know was the "counselor", who was presumed to be learned in the law and was appointed for the purpose of advising the inquisitor of his legal rights and duties, the inquisitor ordinarily being ignorant of the law. So far as I am able to determine this is the only instance in which lawyers were connected with the inquisition, and even here examples were rare. The power of the inquisitor was so broad and arbitrary, it made little difference to him whether he complied with the law or not. I do not find much in the records as to whether inquisitors followed the advice of their counselors, but I deem it to be immaterial.

The next officials were two "discrete and religious men" who apparently had no other title, who were summoned ordinarily from the mendicant orders to listen to the taking of testimony. The universal rule was that no testimony should be taken except in the presence of two such men, presumably to prevent injustice and to give the color of impartiality to the proceedings. The inquisitor had the power to summon whomsoever he desired for this purpose. I do not think they had any other power or authority, except to subscribe the testimony as witnesses when the same was completed.

The last official, and one of the most important, was the Notary, whose duty it was to take down in writing every question and answer, read the same over to the witness, or accused, and cause it to be signed and attested. It seems that careful records were kept of all proceedings before the inquisition in duplicate one of which was hidden away in some safe place, and the other preserved in the records of the Inquisition.

In addition to the above there were countless spies, messengers, bravos and searchers, who were known as "familiars". They were permitted to carry arms, to enter houses, to make all sorts of searches and investigations and were immune from secular

jurisdiction for anything which they might do, being answerable only to the inquisitor.

In addition to all of these the inquisition had at its service the entire secular government with all of its officials and it may be well said that it embraced the temporal governmental organization *in toto*. Where the ruler of the local state or principality was zealous in the cause of the church, he cooperated at will, but where he opposed to the methods of the inquisition, he was coerced to use his authority and instrumentalities in its behalf. The inquisition had a way of treating obstinate secular officials, which apparently was quite effective. If some such refused to assist or obey he was first excommunicated. Then after the lapse of a year if he did not repent his sins and lend his services, he was prosecuted for heresy, and was tried and punished, not only as a heretic, but as a willful obstructor of the processes of the inquisition.

In addition to the state officials we have members of the clergy and practically the entire orthodox population, the duty of all of whom was likewise to obtain and give information and render such assistance as was possible. Hence, the organization of the inquisition was all embracing, widespread, and powerful.

In the early part of the thirteenth century we find traces of "assemblies of experts", whose duty it was to pass on the evidence and assist and advise the inquisitor in arriving at a final determination. Apparently this matter of submitting findings to an assembly became too cumbersome and slow to suit the inquisitor as he was not bound by its findings or advice anyway. Consequently we see the gradual decline and ultimate cessation of any participation by the so-called experts.

As early as 1262 the organization of the inquisition was placed in the hands of the "Inquisitor General", who was appointed by the Pope to take full and complete command. The first inquisitor general was Cardinal Orsini, and it is apparent that his position was one of power and authority, for he was subsequently elected Pope to succeed the one who appointed him, Urben IV.

Prior to the time of the domination of the church courts by the inquisition the procedure of the Episcopal courts was based on the Roman Law, and involved a system which was equitable in theory and limited by strictly defined rules. In these courts, under that system, there were three forms of action: accusatio, denunciatio and inquisitio. In the first of these there was a formal accuser, who swore out the complaint and accepted full responsibility of paying a penalty in the event his charges against the accused were false.

In denunciatio, a public officer by official act summoned the court to take action against an offender, knowledge of whose offense had come to his attention.

In inquisitio, one suspected of crime was summoned, the suspicion communicated to him and he was questioned thereon. If he did not confess, the testimony was then taken from witnesses, out of the presence of the accused, but the names and testimony of whom was subsequently communicated to the defendant. The defendant was then privileged to offer evidence in rebuttal, and from the issues made by this evidence the Court arrived at a determination.

By the inquisition, however, all this procedure was wiped away. The procedure of the inquisition was based upon the inquisitio, but differed from it in a great many particulars. It was stripped of all of its former safeguards. The inquisitor was both the prosecutor and the judge. He ferreted out the crime, searched for and ob-

tained the evidence, heard the trial and judged the accused. This system is rather shocking to us of the present day but it was justified in the minds of the inquisitor at least by the conviction that it was his duty, not only to vindicate the faith and avenge God, but to save the wretched soul perversely bent on perdition, regardless of the means requisite to that end.

It appears in all instances that the presumption was in favor of the guilt of the accused, and all doubtful points were resolved in favor of the faith. The conclusion apparently was reached in the early days of the inquisition that it were better to sacrifice a hundred innocent than to prevent the escape of one guilty heretic. The duty of the inquisitor being to ascertain the secret thoughts of the accused, it is no wonder that zealous inquisitors who were clothed with unlimited and arbitrary powers, swept aside all forms and precedents restricting them, and proceeded directly to that end.

The fact that all of the proceedings were conducted with the utmost secrecy gave considerable impetus to this method. Had the proceeding been public there probably would have been some check upon the system. But the inquisition shrouded itself in the awful mystery of secrecy until after sentence had been awarded, and it was ready to impress the multitude with the fearful spectacle of the final culmination. No one was permitted to know of anything that had happened, except the few discreet men selected by the inquisitor, who were in turn sworn to inviolable secrecy. And even in the times when they had "assemblies of experts" to consult over the faith of the accused, each of these was subjected to a similar oath. The records of the inquisition were also guarded with extreme caution and care, and were to be furnished only to those who were without question authorized to receive the same. Hence, being an absolutely secret proceeding, it continued on its summary way, disregarding forms and restrictions, allowing no participation by advocates, depriving the accused of submitting a defense, rejecting appeals, dilatory exceptions, and doing whatsoever the spirit of the inquisitor moved.

The ordinary course of trial by the inquisition was somewhat as follows: A man would be reported to an inquisitor as of ill repute for heresy, or his name would be mentioned in the confession of another prisoner, or upon one of the frequent occasions when a summons was issued to an entire population to appear and reveal what they might know, the name of some person might be mentioned as being suspected of heresy. Thereupon, a secret investigation would be made, and all available evidence concerning the suspect would be collected, witnesses would be called in secret, their testimony taken in the presence of the notary and transcribed and hidden away. There would be a virtual dragnet to include everyone who might know anything at all about the accused, and all of the gossip, rumor, rancor, enmity and surmise available would be collected, studied and analyzed.

When enough of this was in the hands of the inquisitor to justify an assumption of guilt the blow would fall. The accused would be cited to appear in secret at a given time, or he would be arrested suddenly and brought before the inquisitor.

Then came the examination by the inquisitor. These examinations were typical examples of an encounter between a trained intellect and the untutored mind of a peasant struggling to save his life, his property and his conscience, who was compelled to stand before the inquisitor without knowledge of the charge, without the names of the witnesses or any infor-

mation as to the contents of their testimony.

The accused was not permitted to introduce evidence in his own behalf, except his own answer to the questions of the inquisitor. Neither was he permitted counsel, after about the middle of the thirteenth century, as it had been determined in the early days of the inquisition that the jangling of lawyers, the delay and difficulties arising from their attendance upon the sessions impeded the effective administration of inquisitorial justice, and apparently aided no one. If a lawyer were so hardy as to aid in the defense of one accused of heresy he could be and usually was accused of fautorship of heresy, which was similar to an accusation of being an accessory. He was also subject to charge of impeding the inquisition, which was a serious offense, and therefore could be and ordinarily was tried and punished accordingly. In addition he might be compelled to become a witness against his client, to disclose all statements and communications from the accused to him, to surrender papers and other property of his client which might be of aid to the prosecution. Such compulsion might be attended by torture. Hence, the accused ordinarily was not represented by counsel for which I cannot much blame the lawyers of the period.

At the conclusion of the examination of the accused, subsequent proceedings depended upon what the accused did: whether he confessed or whether he denied. If he confessed, adjured and repented, his soul was declared saved in a solemn ceremony, but his body was subjected to imprisonment for the rest of his life, in order to give him plenty of opportunity to repent. If he confessed and did not adjure, he was handed over immediately to the secular arm and burned at the stake.

If the suspect persistently denied his guilt, then came the interesting part of the trial process, which was torture. Before I go into that phase, permit me to say that many reasons combined to lead the inquisitor earnestly to desire a confession from the accused. In the first place, the inquisitor was determining the guilt or innocence of a man based upon nothing else in the world except what the man thought. The outright assertion of complete orthodoxy might hide heretical ideas, for men then probably as well as now might willingly lie to save their lives. On the other hand, one who had been careless in his speech or conduct might be sincerely orthodox even though he had given the impression of heresy. Confession was a matter of vital importance, not only on these grounds, but to satisfy the conscience of the inquisitor, and to help him over the loose and flimsy character of the evidence, which characterized the proceedings. And so no efforts or means were spared to obtain a confession, whether the man was guilty or not.

The first and least repulsive method was trickery and cunning in the interrogation. This process was somewhat similar to what modern moving pictures and novels tell us is the third degree of our own time. It was deemed perfectly proper to use guile and fraud in the interrogation of the accused, to play upon his hope and fear, his passion or affection, to obtain a statement of his wrong doing and to save his soul for God. Traps of many kinds were laid. Stool pigeons were confined in the same dungeon cell to insinuate themselves in his confidence, to spy upon him and listen. Mercy was promised to him upon confession, and then when a confession was obtained he was forgotten. We have examples of the tears and urgings of members of his family, and almost every other conceivable method of persuasion.

If none of these methods proved to

be effective, the prisoner was remanded to his cell in darkness, fed upon bread and water, or nothing at all, in the hope that his resolution would break down, and he would see the error of his ways. Time apparently was no object. There are examples cited of such imprisonment for three, five, ten years or more between the citation of the prisoner and the ultimate determination of his guilt. If death did not intervene, the accused would be recalled from time to time before the inquisitor and urged to confess, and if he still refused he would go back to his imprisonment, under perhaps more harsh conditions than before.

Ordinarily, however, this means required the expenditure of too much time and money to suit the inquisition, and hence physical torture came to be generally regarded as considerably more efficacious and satisfactory in accomplishing the same end. Under the Canon law such torture could only be resorted to by the concerted action of the Bishop and the inquisitor, but this rule was generally disregarded. If it were violated the only recourse of the victim was an appeal to the Pope, and Rome was a long way off, and the torture was already over with for that time anyway.

Torture was of various kinds. One method was a rack with pulleys at both ends to stretch the arms and legs of the victim a little at a time until they were pulled from their sockets. Another was the wheel, which accomplished the same effect in a different way. A third was the strappado in which the arms of the victim were bound together in back of him, a rope tied to his wrists, run through a pulley at the ceiling and he was lifted off of the floor in that manner. After he had been permitted to hang by his arms in that fashion for a while, it was found to be conducive to confession to let him drop rapidly for a space and then suddenly stop him with a jerk, before he reached the floor. We have also the water cure, branding with hot irons, and a good many other different varieties of torture.

It is interesting to note one point, which is that the accused under the rule should be tortured but once, the time or duration, however, of the torture not being defined. Witnesses on the other hand could be tortured as many times as thought desirable. Another point is that the use of torture was secret, and was not mentioned in the record of proceedings as having had anything to do with inducing confession, and appears rarely in trial records. Its use, however, in widespread cases is adequately proved by papal and inquisitorial communications, bulls rules and other official papers. After the accused had confessed, the contents of his confession had to be confirmed after his removal from the torture chamber. It was read over to him, and he was asked it it were true. If he admitted the truth of it, the record then showed that the confession had been freely and spontaneously given and the culprit was sentenced according to his just deserts. If he retracted and refused to confirm the confession, he was taken back for a continuance of the torture. This was not considered as another torture, but was merely a continuance of the torture which had been started before. Generally when a culprit retracted his confession, the confession was regarded as true, and the retraction as perjury, proving him to be a relapsed heretic, and he was handed over to the secular arm for burning without any further hearing.

All of the rules of the Roman Law as to the admissability of evidence, and of the competance of witnesses to testify was cast aside. No one was incompetent in an inquisitorial proceeding. Wives, children and servants could not testify for the accused, but

their testimony against the accused was welcomed. No legal age was required, although seven years was generally regarded as the minimum. One case is recorded of a conviction of a father and sister and seventy others, upon the testimony of a ten year old boy. Two witnesses were generally assumed to be necessary to condemn a suspect. But if two witnesses could not be found to the same fact, then it was sufficient to have one witness to two separate facts.

Certainty of evidence was unknown, and the character of it, as may well be imagined from the character of the proceeding itself, was loose, flimsy and impalpable. No rules of admissability were in existence. Everything went in, rumors, gossip, suspicion. By virtue of the kind of evidence received and its general looseness, and the impossibility in some cases of securing a confession, there arose a new crime which was called, "suspicion of heresy". There were three classes of this crime: light, vehement and violent, and anything at all was sufficient to convict an accused of any of them at the discretion of the inquisitor. The only difference in the three grades was in the severity of the punishment.

The feature of the proceedings to which I object most was that all knowledge of the names of the witnesses was withheld from the accused, as well as all of the contents of testimony which they had given. This was justified on the grounds of exposing the witnesses to danger, but the result of it was that perjury, and the gratification of malice against an enemy and such kindred results were widespread. A witness could swear falsely against his enemy, and because of the secrecy could feel reasonably safe that his perjury would go unchallenged.

In the event a witness revoked his testimony, it was held as a universal rule that if the testimony had been favorable to the accused the revocation annulled it. If the testimony had been unfavorable to the accused the revocation was void and the witness guilty of perjury.

The defense, being conducted by the accused alone, was mainly no defense at all. If the accused could guess the names of the witnesses and could show that there was blood enmity between them, he had a chance for escape. If he named the wrong witnesses, however, his guilt was conclusive and he was summarily punished. Without any knowledge of the particulars of the offense for which he was tried all he could do was to grope in the dark, and instances of escape by an accused heretic by this method are rare.

The ignorance of the accused was no defense, and that fact alone rendered him worthy of condemnation. Suicide in prison was a confession of guilt. Persistant denial of the crime charged was considered obstinacy and impenitance, precluding hope of mercy, and being punishable at the stake. Insanity and drunkenness were not matters of defense, but of extenuation only.

Acquittal of one accused of heresy was prohibited and no accused was ever discharged as innocent. If the evidence and the effort to obtain confession failed and the inquisitor was satisfied of innocence, he declared merely that the charges against the accused were not substantiated. The result of this was that the inquisition had a constant string upon such person, and in the event he should be reaccused at some future time, he was deemed to be guilty as a matter of course, as the second charge substantiated and proved the first.

After a series of prosecutions had been conducted, the evidence studied and a determination made, the result of these various judgments was communicated upon a certain day, at what was called an *auto de fe*, at which all

of the people in a certain community or district were summoned, and compelled to attend and to listen to the sentences imposed upon the culprits.

The punishment inflicted upon one convicted varied in accordance with the seriousness of the crime. The infliction of the death penalty was never performed by the inquisition, but capital cases were all turned over to the secular arm, which either through coercion as I have previously mentioned or persuasion, carried out the sentence of death. Imprisonment was taken care of by the inquisition itself, although the support and upkeep of prisons in many cases was loaded on to the temporal organization. In theory the only punishment which the inquisition could inflict was merely to withdraw the protection of the church from the sinner and afford him no further or future hope of conversion, as it was considered that the inquisition was a spiritual tribunal, and dealt only with the sins and remedies of the spirit. The inquisition therefore could inflict only such penalties as recitation of prayers, frequenting of churches, discipline and pilgrimages, and fines for pious uses. A good many such penalties consisted in wearing yellow crosses sewed upon the garment, as a humiliating and degrading punishment. In addition to this there was confiscation of property, and a confessed or convicted heretic was deprived of everything which he or his family owned. Another form of punishment was banishment, either temporary or perpetual; this, however, was rarely used. One of the most widespread forms of punishment was enforced pilgrimages to distant shrines, which were compelled to be taken within a certain length of time. The imposition of fines was a favorite punishment for those of a lighter degree of guilt. There are many instances in which penances of other kinds were commuted for fines. Another form of punishment was the destruction of houses or dwellings, which had been adjudged to be contaminated by heresy. Such destruction was made under the authority of the inquisiton itself and was not left to the temporal power. This was in addition to the confiscation of all of the property of the guilty.

Then we have imprisonment of various kinds. Murus strictus, the harsher form, or muris largus a milder form. All such imprisonment was on bread and water and confinement usually was solitary. A prisoner was tenanted in a separate cell, with no access allowed to him, to prevent his being corrupted or from corrupting others. In the milder form the prisoners were allowed to take exercise in the corridors, and sometimes were given an opportunity to converse with each other and often with someone from the outside world. The fact that the burden of expense was cast upon the secular officials did not do much to relieve the hardships of the prisoners, as the secular officials accepted this duty quite unwillingly. It was thought to be better to permit an imprisoned heretic to starve to death than to support him indefinitely with no return. The character of the prisons and dungeons of the middle ages, by what I am able to find, does not argue well for the humanity of the treatment of those who were confined therein. Imprisonment, of course, was the penalty most frequently inflicted. In every case where an accused was found guilty of heresy and failed to repent and abjure, he was handed over to the secular arm and burned. I do not find any other method of capital punishment except burning at the stake.

Prosecution for heresy was not confined to the living, but also included the dead. Examples are frequent of an accusation and trial of some person who had been dead as long as thirty

years. In such cases upon conviction, the bones of the accused would be exhumed and burned, his property, regardless in whose hands, confiscated, and other such penalties inflicted. The tragedy and injustice of the situation is that no one could ever feel safe or be sure that he was beyond the clutches of the inquisition. In the event that his father or his grandfather before him had committed some slight indiscretion, such as sympathy with a heretic or expressions of unorthodoxy, all of his property could be taken from him, and he might be compelled to stand by and see the remains of his ancestor exhumed and burned in an ignominious public ceremony. All this, even though there was no guilt on the part of himself or any of the other members of his family.

In the matter of appeals we find very few instances where appeals were perfected. It seems that an appeal to the Pope from a finding of an inquisitor was allowed, if the appeal were made before sentence was rendered. If not made until after sentence, the condemnation imposed by the inquisitor was final, and no one but the inquisitor himself could change it. In the event that an accused desired to appeal, he was required to apply to the inquisitor for an "apostoli" or a letter remanding the case to the pope. The inquisitor at his discretion could issue either an affirmative letter, admitting the transfer of the case, or a negative letter leaving the case in his own hands. In the case of the issuance of a negative "apostoli" the only way in which the authority or jurisdiction of the inquisitor could be ousted was for the Pope to take the case arbitrarily from the inquisitor's hands. Records of appeals are rare, although there are some instances in which the Pope took the cases away from the inquisitors and disposed of them at his own discretion.

As I have stated at the outset it is difficult for me to understand the atmosphere or spirit of a civilization which would permit such a procedure. The explanations given for it are numerous and some of them reasonable. At the beginning of the thirteenth century, the theory of law was that all law proceeded from the divinity, being handed down by God for the guidance of men. Our modern theory of the law is entirely different in that we deem it to be based upon logic, reason and justice, and to be created by men for their own conduct. But with the idea that all law was of divine origin, it was considered quite reasonable that any act of disrespect against the Deity, the creator of the law, was the most infamous crime possible to commit, and dealing as the inquisitors were with crimes which consisted merely of what a man thought, rather than what he did, it required summary and arbitrary procedure not only to convict of the crime, but to establish the fact that a crime existed. The fact remains that the procedure created and used by the inquisition dominated the courts of the civilized world for something more than five centuries, and we find in the civil law of today many evidences of inquisitorial origin.

In closing, permit me to say that it has been difficult to determine what facts about this topic are effected by color and prejudice, and what are actually true. I have done my best, however, to make no statements which are not susceptible of authentication, by papal and inquisitorial documents. I have had no preconceived notions of the subject and no desires one way or other to make it appear worse than it was or better than it was. My sole interest in it is one of wonder that the mental attitude of the middle ages permitted the establishment of such a system and assisted in its effective and powerful domination of both church and state such a long period.

Education of Lawyers

By JUDGE JOHN H. DENISON, Chief Justice of The Supreme Court of Colorado

THE law is, theoretically, a science. The "practice of the law" is an art, which requires a variety of high qualities, well balanced and correlated. Just as the player of any game of manual skill, tennis, baseball, billiards, must have, for great success, eyes, muscles, joints, nerves and emotions under control and so related to each other that they work in harmony, so the psychological powers of a lawyer must work, and much more education and training than mere knowledge of the written and unwritten law is necessary to that end. The collegiate and other training of the average law student is not sufficient nor is it always rightly directed to secure the most appropriate results. It is true that no knowledge is unappropriate to a lawyer. He is always called upon for the unexpected and often for the unforeseen; no education, therefore, can be too broad and deep and no training too exact for him.

But the law is more. Viewed as an occupation it is a profession, not a mere business, and all reasoning about it by the analogies of business is misleading. One of the characteristics of a profession is that it requires its devotee to spend his time and energy for the benefit of others; to occupy himself with the concerns of others, and, when necessary to their good, to surrender his own. In this respect the lawyer is one with the clergyman, the physician and other professions.

Is it not self evident that for such a life the broadest knowledge and the highest moral training is desirable? Is it not certain that some measure of these qualities is requisite and should be required of every candidate?. Is it not clear that some education and development in the ethical traditions and conventions of the profession is indispensable to the best results. We all lack these things in their completeness. None of us has enough. Some of the greatest of us have acquired some portions without a collegiate course. Lincoln and Marshall did so. But what is the ratio of Lincolns and Marshalls to the uneducated mediocres and shysters, to those whose comprehension of their profession is that it is a mere instrument for making a living and perhaps of acquiring wealth and not a public office with duties and responsibilities as high and exacting as those of a judge?

It is not conceivable that one not widely read can be so good a lawyer as if he were otherwise. He has, let us suppose, acquired so perfect a knowledge of law alone that he can answer any possible question thereon, but has read no history, no biography, no philosophy, none of the great dramas or the fictions of Scott, Thackeray or Dickens and so lacks knowledge of the opinions of great observers of human relations and thinkers on the subject of right conduct and moral obligation; how can he be a proper man to whom to entrust the fortunes of his clients? True one may acquire all this by individual work. Lincoln did so; but he was a miracle, outside of the natural order of humanity. The parishioner said to his pastor "I can worship in the fields", "but", said the pastor, "do you?" No, he does not; nor does the ordinary lawyer make any serious attempt to educate himself. I could name notable exceptions, all honorably high among their fellows, but they are exceptions.

The problem of the courts and the bar is not, as so many arguments assume, to open an avenue of business

success to enterprising men. The ultimate end and aim is justice and the administration thereof. Everything else should be subordinated. To attain this end everything in a lawyers education should be directed.

If the practice of the law were a business it would be well to let those come in who wished and the fittest survive, as in other lines of business; but the legally authorized governmental powers are certifying these men as qualified officers of the court with powers and duties, from which the ordinary man is excluded, to appear for other men in court, to advise them as to their conduct, and, under certain conditions, even to control it. The unrighteousness of thus turning the litigants and seekers for advice over to any class of men except the best that can be selected by the best process that can be devised is obvious. It is equally certain, though not so obvious, that a practicable standard is required by which to measure the qualifications of the new law student. How can we know whether he is worthy?

The proposition that a certain amount of collegiate education should be required in one entering the study of the law is advanced by some and denied by others. The real question, if what has been said above is right, is whether a collegiate course will accomplish the desired end; whether it will give or tend to give the qualities we have mentioned; if it will it should be required and there can be no valid argument to the contrary except to reveal some plan that will more surely or fully produce the same result. Our colleges are organized, upheld and used for these purposes. The people, by using them recognize that they are in some degree efficient to these ends. If there is any substitute which will furnish practicable standard or scale to determine what has been accomplished by way of preliminary education in any given case, I have never heard of it.

It is often urged that the bar should be democratic, i.e. I presume, open to all. If this means open to all on equal terms, we must say "yes", but the terms must be such as to produce the best results, and to best produce the ultimate result, justice by the proper administration of the law. If democratic means more than this, if it means open to the ignorant, who can soberly advocate it?

I am convinced that a collegiate education for every lawyer would be a public benefit, and I think the steps we have already taken in that direction have already begun to show good results, and that such results were manifested in the last class that appeared for examination.

Butler's Retort to Sam'l J. Randall

"General Butler was the leader of the House in 1875, and Sam'l J. Randall, leader of the Democratic side. As the 43rd Congress was about to close, I was with Randall when Butler came up, and Randall asked him to hold a Sunday session. Butler said no, that was not necessary. Randall turned and chaffingly said: 'Oh, that is your New England Puritanism, I suppose. That serves you a good purpose and I expect to meet you some day, Butler, in another and better world.'

"Butler replied in a flash: 'Oh, no Sam; you will be there, as you are here, a member of the Lower House.'"

—Melville E. Stone.

Law and Public Opinion

"With us law is nothing unless close behind it stands a warm, living public opinion. Let that die or grow indifferent, and statutes are waste paper, lacking all executive force."

—Wendell Phillips.

Blue Skies

By JACOB J. LIEBERMAN

(This is the fourth of a series of articles being written especially for the Denver Bar Association Record, by Mr. Lieberman of the Los Angeles Bar, formerly of the Denver Bar, on interesting comparisons and contrasts between Colorado and California law and procedure.)

THIS is not an analysis of a recent popular song, nor a discussion of the relative merits of Jazz and the Classics, nor, on the other hand, is this an astronomical dissertation, but is simply a brief resume of the more interesting phases of the California Corporation Act and Corporation Securities Act.

This subject is particularly timely at this time as considerable agitation is going on within the California State Bar for radical changes in the law relating to corporations in this State. It is also timely because of a recent decision of the Appellate Court in Los Angeles upholding the very broad powers of the Corporation Commissioner of the State of California.

The glaring deficiencies in the corporation laws of California which the Committee on Corporation Law of the State Bar of California (which, it must be remembered is now an incorporated Bar and self-governed) is agitating to have repealed or remedied, are the following:

1. Corporate existence is limited to fifty years and may only be extended for a period of fifty years;

2. There is an unlimited proportionate stockholders' liability as to business corporations (the only other state having this provision being Minnesota);

3. No distinction is permitted as to voting rights in different classes of stock;

4. Different classes of stock issued by the same corporation must either be all of no par value or must be all of a par value.

5. A foreign corporation having preferred stock with a par value, and common stock with no par value, can qualify to do business in this state, while a domestic corporation having such a stock structure cannot be organized under the laws of this state;

6. Fully paid stock of a California corporation is assessable by its board of directors. It is not entirely clear under the law of this state whether a corporation can, if so provided in its articles of incorporation, issue non-assessable stock;

7. Under Article XII, Section 3, of the Constitution, directors of a corporation are jointly and severally liable for embezzlement or misappropriation by officers of the corporation;

8. There are no provisions in the California law for the consolidation, merging or reorganization of ordinary business corporations, or for the protection of minority stockholders in the event of such consolidation, merging or reorganization;

9. The Constitution of the State contains many provisions governing internal management of corporations with the result that as corporate requirements or needs change from time to time the laws applying thereto can be changed to meet these needs only by constitutional amendment.

One of the greatest difficulties which the writer himself experienced in adjusting himself to the California corporation laws arose from the law imposing upon the stockholders of the corporation a proportionate liability for the debts thereof. The writer felt that every time he organized a cor-

poration for a set of clients he was not "selling" them anything; that he was not giving them any service, that is, the clients were not deriving any benefit from the work of their attorney. In other words, under the California Corporation Act, each stockholder of a corporation doing business within the State of California, whether domestic or foreign, is liable for his proportion of the entire indebtedness of the corporation incurred in the State of California. If, for example, a stockholder is the owner of fifty per cent of the stock of the corporation, even though it be fully paid up he is liable for fifty per cent of the entire indebtedness of the corporation, and this is a primary liability on which he can be sued without regard to the liability of the corporation itself, and the creditor is not even obliged to sue the corporation if he chooses not to do so. As indicated above, only two states in the entire country have any such stockholders liability Statutes, and this is a constitutional provision which will require a constitutional amendment to change.

This provision and the provision of the law requiring all classes of stock to be either of a certain par value or of no par value, and not permitting different classifications of different par values, or combining value and no par value, and provisions in the law making all stock, whether preferred or common, voting stock, drives a large number of corporations to incorporate in other States and to do business in the State as foreign corporations inasmuch as the stock structure of a corporation is held by the Courts of California to be a matter of internal organization, and therefore, not within the Statutory regulations.

The "Blue Sky" Act, known as the Corporate Securities Act, on the other hand, is not provoking any agitation (except perhaps among promoters) for repeal or modification except in the matter of strengthening its provisions and putting teeth in the Act, or adding to the powers and duties of the Corporation Commissioner.

Under the provisions of this "Blue Sky" Act, no company is permitted to sell or offer for sale, or negotiate for the sale of, or take subscriptions for any security of its own issue until it shall have first applied for and secured from the Corporation Commissioner a permit authorizing it so to do. Such application must be in writing, verified in the same manner as a pleading is verified, and filed in the office of the Corporation Commissioner, and must contain the names and addresses of the officers, the location of the office, an itemized account of its financial condition, the amount and character of its assets and liabilities, a detailed statement of the plan upon which it proposes to transact business, a copy of any security it proposes to issue, a copy of any contract it proposes to make concerning the same, a copy of any prospectus or advertisement or other subscription of such securities, and such other information as to the company, its condition and affairs, as the Commissioner may require. Copies of minutes, contracts, articles of incorporation, by-laws, etc., relating to the company and throwing light upon its scheme of incorporation and method of doing business, are likewise required to be furnished to the Corporation Commissioner, and if a foreign corporation, it must file an irrevocable power of attorney appointing the Corporation Commissioner its true and lawful attorney upon whom all process in any action or proceeding against it may be served. The sale of such securities without a permit from the Corporation Commissioner is a penal offense.

The Act provides as to the powers of the Commissioner that "if he finds that the proposed plan of business of the applicant is not unfair, unjust or

inequitable, that it intends to fairly and honestly transact its business and that the securities it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the Commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities, as therein provided, in this State, in such amounts and for such considerations and upon such terms and conditions as the Commissioner may in said permit provide. Otherwise, he shall deny the application and refuse such permit." The Commissioner is also authorized to impose conditions requiring the deposit in escrow of securities, the impoundment of the proceeds from the sale thereof, limiting the expense in connection with the sale thereof, and such other conditions as he may deem reasonable or necessary and advisable to insure the disposition of the proceeds of such securities in the manner and for the purpose provided in the permit. He has also the power from time to time to amend, alter or revoke any permit or temporarily suspend the rights of the applicant under the permit, and finally, he is given power to establish such rules and regulations as may be reasonable or necessary to carry out the purpose and provisions of the Act. He also has supervision over stock brokers and stock salesmen and of the licensing of such persons, and no person has the right to issue, sublet or publish any advertisement, pamphlet, prospectus or circular concerning any security to be issued by such company, broker, partnership, association or corporation until the one proposing to issue such security, shall have first secured from the Commissioner a permit authorizing it to issue or sell such security, and a true copy of the advertisement, circular, etc., shall have first been filed in the office of the Commissioner at least one day prior to the publication, circulation or issuance thereof unless same shall be previously authorized by the Commissioner. And the Commissioner has the right to require periodic reports as to the status of the business of the corporation and as to the sale of securities.

The Commissioner is empowered to administer oaths and to make an examination or investigation of the books, records, accounts and other papers and of the business of any company, broker or agent. He has power also to examine the books, records and papers of those whom he believes to have violated or are about to violate any of the provisions of the Act, and has the power to issue subpoenas.

The decisions and orders and other official Acts of the Corporation Commissioner are subject to review by the Courts, but as is generally true in proceedings seeking the review of the official acts of discretionary or quasi judicial officers, the Act here specifically provides that upon such review the Court "shall be limited to consideration and determination of the question whether there has been an abuse of discretion on the part of the Commissioner in making such order, decision, or permit." And the Court of Appeals for the Second District in Los Angeles recently held that certain individuals were properly convicted of violating the Corporate Securities Act when they sold stock in their corporation contrary to the provisions and conditions contained in the permit, the letter having authorized the sale of stock for cash and these individuals having issued stock to themselves in consideration of checks drawn on a bank account where they did not have funds and then issued corporation checks to themselves in like amounts so that in fact the company received no money. The lower court held that in placing conditions in permits, the Corporation Commissioner was exercising legisla-

tive power, which the legislature could not delegate to him. The Appellate Court held this ruling to be incorrect, it took the position that the examination of facts and circumstances and determination of reasonable requirements for the issuance of public safety are not legislative matters, but are matters of discretion.

By the provisions of the Act prohibiting the sale of securities except by a licensed broker or agent, or by the company itself, it seems to have prohibited the sale of securities as defined by the Act even by individuals, partnerships or trusts, unless such sale be of such securities as are not issued by the individual partnership or trust but have been purchased and are owned by such trustee or such individual, partnership or trust, and the securities are defined by the Act as including not only corporate shares or capital stock but instruments offered to the public by a "company", or an "individual" advertising or representing any right to participate or share in oil, gas or other hydrocarbon substances or minerals, or in the proceeds of the sale thereof and all bonds, debentures and evidences of indebtedness issued by any company excepting leases not offered to the public or bills of exchange and promissory notes not offered to the public.

Of course, the Act has been construed as not restricting the right of an individual owning securities not issued by him, to sell them inasmuch as any person has the constitutional right to sell his own property lawfully acquired by him. This has lead to a practice of incorporating in foreign states and issuing the stock in such foreign states and coming into the State of California with so-called lawfully owned and privately held stock for sale by the owner thereof. There is a fear, however, that a court will some day go behind this Act and hold in some particular case that the stock in that case was issued in a foreign state for the sole purpose of evading the Corporate Securities Act of the State of California.

Announcement Concerning the Annual Meeting of The Colorado Bar Association

FOR some months past the officers of The Colorado Bar Association have been engaged busily with preparations for the thirty-first annual meeting. It is scheduled for Friday and Saturday, September 14 and 15, 1928, in the Rose Room of The Antlers Hotel at Colorado Springs.

Realizing the intensity of interest aroused by necessity in the question of a new state Constitution and the calling of an early convention for its consideration and enactment, the program of the sessions this year has been adopted with an eye to demonstration before the lawyers of the state of the comprehensive problems to be solved.

The proceedings open at 10:30 o'clock in the morning of September 14th, and close with the annual dinner to be given at The Antlers in the evening of September 15th at 7:45 o'clock.

The annual address will be delivered on Friday night, September 14th, at 8:30 o'clock, by the Honorable Henry Archer Williams, of Columbus, Ohio, on *Our Shifting Constitution*, with treatment of our Federal compact in the light of changes wrought in the

latter years. The speaker has long been famed in the central and eastern states as a profound thinker of high literary expression. His auditors may well esteem themselves fortunate in their opportunity. And members attending the annual dinner will enjoy a toast response from him of unusual grace and charm.

The first address of the meeting will be that of President Donald C. McCreery, of Denver, on *The Reign of Law*, with special reference to situations in Colorado where law well may be returned to power.

Henry McAllister, of Denver, speaks on *Suggestions for Reform of Criminal Procedure*. Coming from a former District Attorney whose later civil practice has been so general, this discussion should present new view-points and angles of attention.

Erl H. Ellis, of Denver, in *The Public Purse* will handle the subject of taxation along lines and with proposals both startling and original.

Charles S. Thomas, of Denver, will round out the situation with an address on *The Colorado Constitution*. Senator Thomas' rich and rare experience under our first and only state Constitution should make his recommendations for its new content invaluable.

These speeches will bring on hot challenges of propositions advanced, and the convention bids fair to be a lively one.

The annual dinner is the climax of the entertainment. The toast list has not been disclosed in its entirety, but is promised as rare and racy. The Antlers' menu—but enough!

N.B. Colorado Springs is at its loveliest in September—the weather is perfection—hotel rates then are cut in half—all courts are expected to adjourn over the days of the meeting—the Colorado Springs bar is providing appropriate pleasures for the ladies whom members are urged to have accompany them this year—altogether, can you afford to miss the occasion?

Colorado Supreme Court Decisions

(Editors Note—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of).

No. 11,874

Radovich v. Radovich

Decided June 25, 1928.

Common Law Marriage — Property Rights.

Facts—Plaintiff and Defendant lived together under Common Law Marriage for about five years. Complaint alleges that parties were husband and wife and that she had obtained his property by falsely pretending great love and affection, and as soon as she obtained it, she excluded him from the house by violence, struck him, threatened to shoot him and refused to live with him.

The answer denied that the parties were husband and wife and alleged that she cohabited with him on his promise to marry her legally. In replication the Plaintiff alleged that he repeatedly requested her to marry him ceremonially.

Held—Complaint stated a cause of action for divorce was started and cause of action for recovery of the property.

Judgment Affirmed.

No. 11,871

M. G. Sanderford, v. The Walker Investment Company, a Corporation.

Decided June 4, 1928—Dept. 2.

Tax Deeds—Validity

Facts—W. claimed land under tax deeds and brought suit to quiet title. S. defended on the grounds that: (1) statutory notice was not given; (2) written request was not signed; (3) W. was grantee of a quit claim deed dated before the taxes became due and was, therefore, under a duty to pay the taxes; (4) W.'s predecessor in interest had sued for rent before these taxes accrued.

Held—The record shows that sufficient notice was given. An unsigned written request may be valid as an oral request. The date on the quit claim deed is not controlling, because it was delivered after the taxes became due. Mere suing for rent does not establish ownership.

Affirmed.

No. 11,858

Seifert v. Gildersleeve

Decided May 14, 1928.

Contracts—Fraud—Patent Rights

Facts—Seifert was the inventor of certain rotary bits, mudder and whirler, for use in drilling oil wells. He entered into a written contract with Gildersleeve, a promoter, for the organization and promotion of a corporation to develop and market the bits. Subsequently a corporation was formed and subsequent to the formation of the corporation, a new contract was made covering the same subject matter, but less favorable to inventor.

Seifert sought to avoid second contract on ground that first contract was still in force and that there was no consideration for second contract and further because the contract gave no right to the corporation to sublet the sole and exclusive rights to make and distribute the invention.

Held—1. The corporation for promoting the patent not having been in existence at the time of the first contract, was not bound by the first contract and the corporation's promises in the second contract constituted good consideration.

2. The assignments by Seifert of the patent to the promoting corporation were of such a full and complete character as to vest in the corporation the entire beneficial interest in both the invention and in the monopoly. The corporation had the right to grant the sole and exclusive license to make and distribute the invention.

Affirmed.

No. 11,770

The Globe National Bank v. George McLean.

Decided June 11, 1928.

Banks and Banking—Construction of Guaranty Contracts

Facts—The City Bank sold all its assets to plaintiff and executed a guaranty contract, which defendant with others signed. Among the notes so guaranteed was a secured note of one Curtis. This was objected to as an asset of plaintiff by the Bank Examiner. Whereupon the objection was met by Curtis conveying the security for this note to the City Bank, whereupon the Globe surrendered said note and entered it up as paid. As part of this transaction, the City Bank gave its note in like amount as the Curtis note, together with the Curtis security, to one Skinner, who in turn gave his own note in like amount to the Globe and deposited the City Bank's check and security as collateral. Defendant, under the contract, guaranteed all of the original notes or extensions thereof and "the payment of all indebtedness represented by said notes". The Skinner note was not paid, and plain-

tiff seeks to hold defendant as guarantor. Judgment for plaintiff, and defendant appeals.

Held—The substance of defendant's agreement was to see that the "indebtedness represented by" the original notes were paid, and the debt now represented by the Skinner note is still in fact the debt represented by the Curtis note, even though Curtis personally has been discharged.

Affirmed—Denison, C. J. and Walker and Butler, J. J. dissent.

No. 10,631

The Holbrook Irrigation District, a Public Corporation, v. The Fort Lyon Canal Company, a corporation.

Decided May 14, 1928.

Water and Water Rights

Facts—The District in 1902, according to map and statement of 1903, started a survey for the "Reservoir Canal", claiming appropriation for storage. In 1906 a map and statement showed survey for the "Irrigation and Storage Canal". In fact, the "Reservoir Canal project was abandoned because of prohibitive expenses and all diversions were through the "Irrigation and Storage Canal", but the company in filings subsequent to 1906 related all diversions back to the original survey on the "Reservoir Canal", and on such basis secured decrees below for priorities as of 1902, not only for storage but for direct irrigation. The District excepted to the decrees, and upon its motion for rehearing and new trial being denied, docketed the case here and filed briefs and abstract. Then, at the *company's* request, the trial court re-opened the case over the District's objection. Slightly modified decrees resulted, to which the District still objected and filed herein a supplemental record and assignment of error, this review being on both the original and supplemental record.

Held—(1) Although a re-opening requires showing of good cause and that petitioner is aggrieved, yet as the District itself had assigned refusal to do so as error, it cannot now object that the allowance of review was error. However, the company by requesting such admitted the denial was error and so must bear costs involved in original record.

(2) The "Reservoir Canal" project, never being more than a theory and admittedly abandoned because of prohibitive expenses, cannot serve as a basis for relation thereto of subsequent appropriations through the "Irrigation and Storage Canal". Priorities, therefore, must rest on the basis of the work of the "Irrigation and Storage Canal", and even there distinction must be made between appropriation for storage and for direct irrigation, as appropriation for one is not appropriation for the other. Decrees below will be modified to conform with the facts of the respective appropriations, eliminating the phantom Reservoir Canal as a factor.

Reversed in part with directions.

No. 11,898

M. J. Galligan v. The Independent Order of Foresters, a Corporation.

Decided May 14, 1928.

Process—Service of Summons

Facts—Defendant moved to set aside judgment, setting up that the only service of summons had been upon one Holmberg, appointed in 1904 as defendant's agent for process under the Act of 1893 (C.L. 1921, Sec. 2322), whereas under the Act of 1911 re fraternal benefit societies (S.L. 1911, page 432) the Commissioner of Insurance was required to be and was designated the only agent for process. Judgment was set aside. Plaintiff stood on the record, and the action being dismissed, he now appeals.

Held—Record and complaint show defendant was in fact a fraternal benefit society, and hence the Act of 1911, requiring designation of the Commissioner of Insurance as agent for process, controls, instead of the earlier general corporation act, and the designation of the commissioner of insurance thereunder operated to revoke the prior agency.

Affirmed with modification that dismissal be without prejudice.

No. 11,932

Radovich v. Douglass

Decided June 11, 1928.

Libel and Slander-Privilege

Facts—Douglass recovered judgment against Radovich on two causes of action, one for libel, and the other for slander. The Defendant contends that the communications were qualifiedly privileged.

Held—Qualified privilege is an affirmative defense to be pleaded by the Defendant, unless the complaint sufficiently pleads facts showing that the publication is privileged.

Judgment Affirmed.

Threats

"Extreme and belligerent expression, unsupported by resolution, is weak and without effect. No man would draw a pistol who dares to shoot. The government that shakes its fist first, and its finger afterwards, falls into contempt." —*Elihu Root.*

NOTE!

As one of the purposes of THE RECORD is to afford a means for free expression by members of the bar on subjects of benefit to the profession, and as the widest range of opinion is desirable in order that the different aspects of these matters may be presented, the editors assume no responsibility for the opinions in signed articles, the fact of their publication indicating only the belief of the editors that the subject treated merits consideration and attention.

Ingersoll's Creed

"My creed is to love justice, to long for the right, to love mercy, to pity the suffering, to assist the weak, to forget wrongs and remember benefits, to utter honest words, to love liberty, to make relentless war against slavery in all its forms, to love wife and child and friend, to make a happy home, to love the beautiful in art, in Nature, to cultivate the mind, to be familiar with the mighty thoughts that genius has expressed, the noble deeds of all the world, to cultivate courage and cheerfulness, to make others happy, to fill life with the splendor of generous acts, to destroy prejudice, to receive new truths with gladness, to cultivate hope, to see the calm beyond the storm, the dawn before the night, to do the best that can be done and then, to be resigned."

CHAS. H. SCOTT
President

EDWARD WHITLEY
Treasurer

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